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IN THE

Supreme Court of the United States

No. 821

OCTOBER TERM, 1961.

LAS VEGAS HACIENDA, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner's Brief in Reply to the Brief for the Civil Aeronautics Board in Opposition.

EDWARD L. COMPTON,
JOHN W. PRESTON, JR.,
Suite 1232, Rowan Building,
458 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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ARGUMENT.

Importance of Questions Presented.

The Board in its Brief in Opposition addresses itself solely to the question of probable error. At no point does it take issue with petitioners contentions with regard to the importance of the questions presented. For the reasons stated in its petition, petitioner respectfully submits that each question presented is clearly of importance and warrants consideration by this Court.

Probable Error.

1. The Board's argument that the "for compensation or hire" language of the Act should not be given its common and ordinary or technical meaning, that recourse should be had instead to judicial views as to the need for regulation under the broad, general policies of the Federal Aviation Act is unsound.

Neither party has found legislative history attempting definition of the "for compensation or hire" language. The Act itself is silent. But, that language has a well understood common and ordinary meaning which the carrier cases have adopted (See Pet. at pp. 11-12, and cases cited). In particular, the carrier cases have held that where as here a carrier charges the same price for its goods and services when transportation is provided as when it is not, then carriage is not "for compensation or hire." (Pet. at pp. 12-13). The issue has been raised and resolved in some fourteen jurisdictions and twenty-three cases; only two have held to the contrary. The rule is hence well established elsewhere and petitioner believes well grounded in sound reason: *Re Larchmont Apartments, Inc.*, 16 P. U. R. 3rd 45 (N.Y.P.S.C. 1956); *Collins-Dietz-Morris Co. v. State Corporation Commission*, 154 Okla. 121, 7 P. 2d 123 (1931).

Neither the Board in its Brief or the Court below has disputed the common and ordinary meaning of the language or its technical application in the law of carriers. What both contend is that to adopt such a definition would defeat the statutory purposes and render regulation by the Board ineffective; further that regulation of all those who compete in the commercial market is necessary to effectuate the statutory purposes. The

established meaning and effect of the statutory language is accordingly ignored entirely and the state cases in point summarily dismissed.

It is first submitted that this is flatly contrary to this Court's decisions in *N. L. R. B. v. Coca-Cola Bottling Co.*, 350 U. S. 264, 100 L. Ed. 285 (1956), and *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 88 L. Ed. 1488 (1944). Secondly, there is no evidence of record whatsoever to support the factual assumption of economic impact on commercial carriers and the market upon which the Ninth Circuits policy views rest. The Circuit Courts opinion is no more than a judicial guess as to the effect of petitioner's operations, a complex fact question. And it is to be noted that in the absence of any evidence in point the Board in its opinion did not venture into this area.

It is submitted that it was for congress to decide how far to carry regulation so as to achieve the statutory objectives and that it did decide when it limited coverage of the Act to carriage "for compensation or hire." The congressional decision was not to "cover all commercial operations" (Rhyne, Civil Aeronautics Act Annotated at pp. 42-43 (1939); also authorities Pet. at p. 19). The Circuit Courts decision which blankets the field thus constitutes a "retrospective expansion of meaning which properly deserves the stigma of judicial legislation". (*Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 618).

It is submitted that the "for compensation or hire" language should, in the absence of attempt at definition in the statute or legislative history, be given its common and ordinary or technical meaning and that the court below erred by ignoring that meaning entirely and by

retrospectively expanding the scope of regulation by recourse to its own views as to the need for regulation.

2. It is variously suggested in both decisions below and in the Boards brief here, that petitioner's package tour is merely a guise, that petitioner cannot arbitrarily select out the flights for its own convenience and call them free while charging for the other package items, that failure to separately state a charge cannot be used as a devise to avoid regulation; in short, it is argued that petitioners torn package arrangement is a matter of pure form, not substance, adopted as a means of avoiding regulation.

This argument misses the entire thrust and import of the carrier price differential cases (Pet. at pp. 11-12), of the fact that petitioner charges no more when transportation is provided as when it is not. The other items making up the tour package are part of petitioners regular bill of fare. These items are sold at the same price at petitioner's hotel to all comers. The price attributed to each item in the tour package is the going price for each item. No more is exacted from tour patrons.

It would thus seem clear that the package arrangement is more than mere form or an arbitrary allocation selected by petitioner for its own convenience. Indeed, the Board found that the cost of the flights "in all probability equals or exceeds the aggregate costs of all other items." (Pet. App. at p. 22). Thus while selling the other package items at the same price they would otherwise be sold for, petitioner at least doubles its costs when the tour flights are included. There is a substantial economic bite. The arrangement is more than mere form. It should be obvious on such facts that Peti-

tioner neither recovers its costs or derives any profit from the flights as such, hence does not provide transportation "for compensation or hire."

It is submitted the economic or practical reality is that the flights are exactly what they purport to be, a promotional device to increase petitioner's hotel and entertainment business. Other hotels in Las Vegas resort to elaborate, expensive, and non-compensatory floor shows, paying well known entertainers huge salaries. Petitioner does not, but provides airplane trips instead. In each case the purpose and effect is the same, only the means differ.

As to the potential scope of operations like petitioners, it would appear that they would only be economically feasible in a similar resort type area, in which promotion plays a major role. The suggestion of widespread recourse to such operations throughout the country is no more than an attempt to march by an imaginary parade of horribles.

3. The cases cited by the Board in its brief to support the Ninth Circuit's result are readily distinguishable. *Herbert v. Shanley Co.*, 242 U. S. 591, 594-595, did not involve the "for compensation or hire" language which is language of art in the law of carriers. The particular policy of the copyright statute dictated the result, and the facts of the case are not even remotely similar to those here.

Shores and Brown Common Carrier Application, 26 M. C. C. 243, involved a one price package tour. But there the resort hotel made a designated additional charge of $13.00 for transportation over and above what it would otherwise have charged for the other tour items. And in *Huff Common Carrier Application*, 16 M. C. C.

159, 27 M. C. C. 643, an application for a "Certificate of Convenience and Necessity" was involved. No "for compensation or hire" issue was raised or decided.

Ollendorf Watch Co. v. Pink, 279 N. Y. 32, 17 N. E. 2d 676, 677, and *E. I. du Pont de Nemours & Co. v. Kaufman & Chernick Co.*, 337 Mass. 216, 148 N. E. 2d 634, 636, are both distinguishable as there the issue was whether there was "consideration", not whether there was "compensation or hire".

4. The reliance of the Board in its brief in *United States v. Drum*, 268 U. S. 370, with regard to the scope of review issue is missplaced.

There this court held that:

> "Because the Commissions resolution of the issue does not seem to us to violate the coherence of the body of administrative and judicial precedent so far developed in this area, we are of the opinion that there was no occasion for the District Court to disturb the conclusion reached by the Commission." (*Ibid.* 368 U. S. at 376).

Thus in the *Drum* case, the Commission's decision did not "violate the coherence of the body of administrative and judicial precedent so far developed". In the instant case, the Board's decision was directly contrary to the overwhelming weight of prior administrative and judicial precedent in the area.

5. Finally, with regard to the scope of order issue, the Board at page 12 of its Brief contends that the Board need not tell petitioner "how far it can go without breaking the law".

The Federal Aviation Act is a regulatory not criminal statute. If petitioner does not transcend the statu-

tory bounds, its conduct is perfectly lawful and legitimate. Where those bounds are to be fixed has been decidedly uncertain prior to this case, one of the first to consider the particular issues here involved. The suggestions of wrongdoing in the Board's brief is wholly without merit. Petitioner has assessed and determined the law as best it could determine it and continues to believe its position, supported by substantial authority, is correct.

Of course, it is not incumbent on the Board to tell petitioner how far it can go without breaking the law. Indeed, it would appear clear (see authorities Pet. at pp. 23-29) that the Board cannot do so. But petitioner believes the law to be that the Board must give petitioner fair notice of how far it can go without violating the Board's *Cease and Desist Order*. The Ninth Circuit in its opinion stated the Board should have been able to frame an adequate more specific order without undue difficulty. Petitioner submits that under any circumstances no less should be done.

Respectfully submitted,

EDWARD L. COMPTON,
JOHN W. PRESTON, JR.,
By EDWARD L. COMPTON,
Counsel for Petitioner.